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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,

Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

This action was initially filed on behalf of two students, Respondent Lindsay Earls ("Lindsay") and Respondent Daniel James ("Daniel").

Respondents tell us Lindsay now attends Dartmouth. (Brief, 4).[1] They mention, by footnote, that Daniel has enlisted in the United States Armed Forces. (*Id.*, note 4)

Respondents' Statement of the Case details Lindsay's life at Tecumseh, where she rarely attended parties or dated. (Brief, 4). Tecumseh does not dispute that Lindsay maintained a lifestyle of modesty and propriety during her high school years and worked diligently in order to be admitted to Dartmouth.[2]

Respondents infer that all students in Competitive Activities are "a group of well-behaved students" just like Lindsay. (Brief, 14). It is naive to suggest, as Respondents suggest, that all students engaging in Competitive Activities do not party, date or know what marijuana looks like. (Brief, 5).

Unlike Lindsay, Daniel did go to parties with other Tecumseh students. In a year and a half, he observed approximately twelve Tecumseh students under the influence at those parties. (J.A. 123). The record also shows that during his short tenure as a Tecumseh student, Daniel's school experience was vastly different from Lindsay's experience in the areas of discipline (C.A. App. 83, 84, 1048, 1050) and academics (J.A. 68, 69; C.A. App. 222). Daniel

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[1] Brief of Respondents, hereinafter referred to as "Brief".

[2] Tecumseh is proud of the fact that Lindsay was the recipient of a scholarship in order to attend such a prestigious college. (*See*, "Tecumseh, Oklahoma High School Senior is Among 12 Winners of ACLU College Scholarship for Youth Activism," *available at* http://www.aclu.org/-news/2001/n052301a.html).

never met the O.S.S.A.A. academic eligibility standards to compete on Tecumseh's Academic Team, which he alleged suspicionless drug testing restrained his "right" to pursue. (J.A. 18, 19). In spite of his academic ineligibility, he was able to remain in the Academic Team class and participate in all the noncompetitive activities associated with it. Likewise, refusing suspicionless drug testing under the Policy would not have affected his attendance and participation in the class activities.

During his time at Tecumseh, Daniel counseled other students about the perils of drug abuse (J.A. 17, 18) and, in that role, talked to other Tecumseh students about their past and current drug use. (J.A. 122, 124). The Life Guides program in which Daniel was a member is a collaboration between Tecumseh and the Youth and Family Resource Center to deter and combat drug use. (C.A. App. 60, 935). For Respondents to say that Tecumseh has no drug problem contradicts Daniel's own testimony that he observed about a dozen students under the influence of drugs (J.A. 123), as well as his knowledge of students at the park doing drugs (J.A. 124) [3], and of at least two students who attended drug rehabilitation programs during his short tenure at Tecumseh. (J.A. 123).

The school records and lifestyles of Lindsay and Daniel evidence the reality that a wide variety of students engage in extracurricular activities and some of those students want to engage in Competitive Activities. Similar to the general

[3] In contradiction to Daniel's opinion that the students who hang out in the park adjacent to the school do not participate in extracurricular activities, the High School Principal testified that both categories of students frequent the park. (J.A. 106).

student population, some of those students do not use drugs, but some of those students do.[4]

The implementation of the Policy in 1998 was not a rush to judgment by the Board nor was it implemented solely as a response to several vocal parents concerned about drug abuse in order to signal a "tough on drugs" attitude, as Respondents contend. (Brief, 3).[5] The primary purpose for the implementation of the Policy was to address the long-standing drug problem in Tecumseh by utilizing this tool in an effort to eliminate student drug use by the students who do use them; to obtain counseling and treatment for drug users; and to deter those students who might be inclined to use drugs due to peer pressure.

The Tecumseh Board began to discuss the implementation of a drug-testing policy during the 1994-1995 school year and continued to discuss it thereafter on a yearly basis. (J.A. 84). The Policy was not implemented during that earlier period of time "because some of the school board members didn't think we (Tecumseh) had that much of a problem. But if you speak to them today they will tell yes (*sic*), we do." (J.A. 85).

In Spring 1998, the community became more aware of the problem. (J.A. 85). Parents and grandparents called Tecumseh Board members and stopped them in the com-

[4] Respondents miss the point when they take issue with the Solicitor General's fact that two of the four students who tested positive were engaged in FFA, stating that these students would have been drug tested anyway because they were also engaging in Athletics. (Brief 2, note 2). The significant point of this fact is that students engaged in FFA competition engage in substance abuse.

[5] *Amici* The Rutherford Institute quotes the testimony of Tecumseh Board President wherein she expresses her opinion that students engaged in competition represent Tecumseh. They therefore conclude the "primary purpose" of the Policy is to "safeguard the reputation of the school district." (Brief *Amicus Curiae* of The Rutherford Institute, 9). The totality of the record simply does not support this conclusion.

munity to lodge their concerns to these elected officials. (*Id.*) The Tecumseh Board President provided some detail about one of those conversations that occurred at the local supermarket:

> A. One of them was a clerk. Her daughter had skipped school and gone to her boyfriend's. And she made the statement that she knew they were smoking pot and she was very upset that her daughter had skipped school and that something needed to be done.
>
> Q. Okay.
>
> A. That's one in particular because the daughter came in about 15 minutes later and was very belligerent, just flung herself in front of some people between me and the people that were waiting, and very unrespectful to her mother. Wanting to know who she was talking to and why was she talking about her and things like that, and I just turned around and told her she's talking to me. (J.A. 88).

Certainly, the Tecumseh Board did not specifically know the details of Daniel's knowledge of drug abuse when it adopted the Policy at issue here. Daniel did not attend the public hearing conducted by the Tecumseh Board to discuss the Policy.[6] But Daniel's testimony compellingly demonstrates the

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[6] The Tecumseh, non-district and home schooling parents who have joined Respondents as *Amici Curiae* claim they did not know about the meeting (Brief of Jean Burkett, *et al.*, 2), although prior notice was publicly posted by Tecumseh as required by law, and the local newspaper reported the pending August 31, 1998 special meeting on August 20, 1998 ("School Board Will Discuss Drug Testing" *available at* http://www.tecumsehok.com/CountyWide/980820d.htm), and August 27, 1998 ("School Board to Consider Drug Testing" *available at* http://www.tecumsehok.com/CountyWide/980827d.htm). The local newspaper also reported the results of the public meeting shortly thereafter ("Parents Want Student Drug Testing Now. . ." *available at* http://www.tecumsehok.com/CountyWide/980903b.htm).

conditions that made the Tecumseh community aware, through reason and common sense, that drug abuse exists in Tecumseh. To call such drug abuse "negligible," as the court of appeals and Respondents do. fosters the misguided notion that school districts must condone a fixed minimum of drug abuse which is known by officials, parents and students before such abuse reaches some undefined level that enables them to take additional steps to alleviate it.

While the quantum of drug use by students at Tecumseh acknowledged by Daniel, standing alone, may not give rise to a drug concern important enough to members of a board of education in another school district to implement a suspicionless drug testing program, the Tecumseh Board, who are all parents or grandparents of Tecumseh students and are acutely and intimately aware of the conditions within the school district, determined that the drug abuse that existed in the District was more severe than it should be. The Tecumseh Board determined that suspicionless drug testing should be employed in an attempt to eradicate the problem and obtain counseling and help for the students who were abusing drugs.

Respondents also inform the Court that these students, *i.e.*, those who do not engage in school athletics, are not role models to other students, and other students would not strive to emulate their behavior. They contend that drug testing of the non-athletes does not deter any other student from drug abuse (Brief, 11, 15, 44-45). This contention defies the common and everyday understanding of all people that students gravitate toward distinct groups and cliques in school. While a FFA student in rural Oklahoma may not associate with athletes, it cannot be questioned that a FFA student is likely to engage in social activities with other FFA students, both inside and outside of school. Students will tend to emulate and model the behavior of students with whom they feel kinship and share common experiences. It is axiomatic that "[t]he law of imitation operates, and

nonconformity is not an outstanding characteristic of children." *Illinois ex rel. McCollum Board of Ed. of School Dist. No. 71*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). Further, "adolescents are often susceptible to pressure from their peers towards conformity, and that influence is strongest in matters of social convention." *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

Respondents additionally infer that the implementation of the Policy at Tecumseh strangles the "free mind at its source," teaches its students "to discount important principles of our government as mere platitudes" and transforms Tecumseh into an institution "of coercion and captivity." (Brief, 16).

Ironically, while Daniel objected to the use of canine interdiction programs, surveillance cameras, and car searches (C.A. App. 208-210), as well as the suspicionless drug testing program by Tecumseh as invasions of his privacy, he voluntarily agreed upon graduation to be subjected to suspicionless drug testing by the government by his enlistment in the United States Air Force. Likewise, if other Tecumseh alumni aspire after graduation to choose certain occupations such as nuclear power plant employees,[7] army civilian employees,[8] railroad employees,[9] airline employees,[10] prison employees,[11] Department of Justice employees,[12] customs agents,[13] firefighters or emergency medical

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[7] *Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988)

[8] *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989)

[9] *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989)

[10] *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990)

[11] *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989)

[12] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989)

[13] *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989)

technicians,[14] police officers,[15] commercial truck drivers,[16] school bus drivers,[17] or employment in virtually all Fortune 500 companies,[18] they too will be subject to suspicionless urinalysis testing. Even during high school life, as experienced by Daniel in the City of Tecumseh, a student is required to consent to suspicionless drug testing when applying for a part time job with McDonald's or K-Mart. (C.A. App. 217). The conditions created by the Policy are no different from those to which Tecumseh students will be required to adapt in our society as it now exists.

The question presented to this Court by Respondents in their Brief in Opposition to the Petition for Certiorari erroneously suggests that the Tecumseh teachers, administrators and Board President acknowledge a complete absence of drug use among students in Competitive Activities.[19] The record simply does not support their question as presented. The choir coach suspected members of the choir to be on drugs (J.A. 125); and when asked about drug use overall among her choir students, she stated "[A]nd you're going to find that a lot of those students don't take drugs, but some do. They may be intelligent but not smart." (J.A. 128). The FFA coach as well believed students in FFA were abusing drugs

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[14] *Saanedra v. Albuquerque*, 73 F.3d 1525 (10th Cir. 1996)

[15] *Ford v. Down*, 931 F.2d 1286 (8th Cir. 1991)

[16] Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C.A. § 31301, *et seq.*

[17] Id.

[18] "American Civil Liberties Freedom Network—Drug Testing of Workers Keeps Rising," January 12, 1998, *available at* http://www.aclu.org/news/w011298b.html.

[19] "Whether the court of appeals correctly held that the Fourth Amendment protects students . . . where teachers, school administrators, and the board president agree that no documented drug problems exists among the targeted group . . . ." [Brief in Opposition, (i)]

and has overhead those students discussing drug use though he believes these students may be less likely than the general population to engage in substance abuse. (J.A. 119-121). Indeed, two of the four students who tested positive in the 1998-99 and 1999-00 school year were students engaged in FFA competition. Moreover, the Tecumseh Board President clearly acknowledges drug use by students in extracurricular activities, although she too believes there may be a greater drug problem in the overall student population.[20] On the other hand, the High School Principal believes that students in extracurricular activities are no different than the general student population with regard to drug abuse. (J.A. 106).

ARGUMENT

1. Proof of an Extraordinary Drug Problem is Not Required in Order to Establish Tecumseh's Status as a Special Needs Environment.

Respondents interpret *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*") as approving "a generalized search of students only upon showing *a number of demonstrated and specific circumstances* establishing a governmental interest reaching beyond the school's *everyday* needs." (Brief, 10) (Emphasis ours). They contend that *Vernonia* demonstrates "that such searches are permitted upon a showing of need beyond the *ordinary* needs of school administration." (Brief, 13) (Emphasis ours). Respondents argue that since Tecumseh has not established an interest beyond the school's *everyday* needs, or a need beyond the *ordinary* needs of school administration, Tecumseh's Policy is unconstitutional.

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[20] "We have students that are on drugs, use alcohol, and they are in extra-curricular activities. There are probably more that are not in activities." (J.A. 101).

The evidence in *Vernonia* which provides the basis for this Court's approval of a suspicionless drug program for the targeted group of athletes was of the same quantum and character of evidence presented here. Students in general began to speak out about their attraction to drug use and began boasting about it and disciplinary referrals in general increased. Several students were suspended for drinking alcohol. A wrestler suffered an injury, which the wrestling/ football coach believed was caused by drug use and the coach observed omissions of safety procedures which he believed may have been caused by drug use. Small groups of students not identified as athletes were observed by a teacher passing marijuana back and forth off school property, and a group of athletes was arrested for consuming alcohol and drugs at a student's house. Some students admitted drug use to school officials, and one student was sent home who appeared to be inebriated.

The overwhelming majority of the evidence of drug use in *Vernonia* necessarily involved observations and opinions of teachers and administrators based on inferences drawn from the behavior and conduct of its students in general. In small school districts such as Vernonia and Tecumseh, school officials know their students. They know them on a first-name basis, know their family life, and know how they normally behave.

The critical flaw in Respondents' interpretation of *Vernonia* is that the facts regarding overall drug use in *Vernonia* were sufficiently demonstrated and specific to establish an interest of school officials beyond the school's *everyday* needs necessary to implement a suspicionless drug testing program for its athletes. The same finding should result in this case.

If Tecumseh's previously detailed record of its drug problem is not the type of demonstrated and specific circumstances Respondents contend are required, Tecumseh school officials would have to ignore as simply everyday and

ordinary occurrences in school life the students in FFA, FHA and Choir classes who appear to their teachers to be under the influence, reports by the choir students to their teacher that others in choir are doing drugs, conversations by students overheard by the FHA and FFA teachers in which drug use is openly discussed, counselors listening to students admit their present and past drug use, the principal's sense of the smell of marijuana on students, the confiscation of prescription drugs being sold by eighth grade boys, marijuana found in a student's car, in the middle school locker room and in the parking lot, and students being placed in drug rehabilitation facilities.

Respondents' position that a certain amount of drug use should be now acceptable as an activity normally engaged in by students undermines our national mission to stop drug abuse among our children. More important, such a heightened standard would require Tecumseh to tell parents, teachers and students that the presence of such abuse in Tecumseh is part of usual everyday school life that must be tolerated.

Respondents contend that Tecumseh must prove a special need beyond the special need that already exists in a school setting in order to demonstrate that its Policy is constitutional.[21] This additional special need presumably is proof of a drug problem beyond the *everyday* drug problem schools may endure. Respondents argue therefore that Tecumseh must prove an "extraordinary" drug problem as a threshold issue before proceeding to the *Vernonia* balancing test.

This Court has never required proof of a double special need to demonstrate the constitutionality of a search. Unlike

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[21] "To survive constitutional scrutiny, therefore, the School's Policy must be designed to serve a special need, beyond the normal need for school discipline that prompted the Court in *T.L.O.* to find the warrant and probable cause requirements inapplicable in schools." (Brief, 17).

the environments reviewed by this Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) or *Chandler v. Miller*, 520 U.S. 305 (1997), a special need for relaxation of the Fourth Amendment in order to maintain discipline and order among our schoolchildren already exists in Tecumseh due to its very nature as a school district. *New Jersey v. TLO*, 469 U.S. 325 (1985); *Vernonia, supra*. Moreover, the drug testing regime here has absolutely no law enforcement involvement. If a student tests positive, law enforcement is not contacted. The parents of the student are contacted and the student is required to obtain counseling and demonstrate no further drug abuse. If the student refuses to obtain counseling or engages in further drug abuse, the student is merely unable to compete. Law enforcement is not involved in any manner.[22]

While it is true this Court prefaced the *Vernonia* opinion with the details of the drug problem that existed in that school district, such details served both as a statement of the case and as a precursor to this Court's factual review of the immediacy of the school's concern. The drug use in that district did not cause this Court to find another special need to justify a departure from the requirements of the Fourth Amendment, and the level of drug use in Tecumseh should not be the basis to determine an additional special need.

For an individualized search, the special needs of the school setting dispense with the warrant and probable cause requirements. The test for reasonableness is whether the search is justified at its inception based upon reason and common sense and whether the search is reasonably related in scope to the circumstances which justified the invasion. *T.L.O.*, supra, 469 U.S. at 341.

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[22] Of course, any student found to be in possession of illegal drugs at school is disciplined and law enforcement is called because of the student's violation of law. This is distinct from the Policy at issue here.

For a suspicionless search, the special needs of the school setting do not change. The test for reasonableness does. Tecumseh's Policy should be judged for reasonableness by balancing (1) the nature of the privacy interests of the students engaged in Competitive Activities and the nature and character of the intrusion against (2) the nature and immediacy of Tecumseh's concern based upon reason and common sense and the efficacy of Tecumseh's program to address the concern.[23] *Vernonia*, supra, 515 U.S. at 654, 658, 660. Since Tecumseh represents an environment of special needs, the *Vernonia* balancing test must be applied.

2. Tecumseh Students Engaged in Competitive Activities Have a Diminished Expectation of Privacy.

To determine the nature of the privacy interest of students engaged in Competitive Activities, the first factor to consider is that students, generally, have a diminished expectation of privacy than other citizens. On this point, Respondents agree. (Brief, 18). Tecumseh's Brief of Petitioners outlines the factors which demonstrate that students who voluntarily engage in Competitive Activities have a more diminished privacy interest than students generally.[24]

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[23] *Amici Curiae* The Rutherford Institute ignores the *Vernonia* balancing test. Like Respondents, it mistakenly urges this Court that "special needs" different from those recognized in *TLO* and *Vernonia* must be demonstrated by a school district before it is permitted to have flexibility under the Fourth Amendment when suspicionless drug testing is at issue. (Brief *Amici Curiae* of The Rutherford Institute, pgs 8, 9).

[24] Respondents contend Tecumseh has "admitted" the OSSAA rule regulating out-of-school behavior has never been utilized in the State of Oklahoma. (Brief, 20). To the contrary, Tecumseh objected to the Interrogatory as broad and overreaching and could only answer that it was not aware of the rule's state-wide enforcement. Tecumseh does not maintain and therefore had no knowledge of state-wide records. (J.A. 46)

Contrary to Respondents' assertions (Brief, 20, 21), the voluntary nature of Competitive Activities is an additional and important factor to consider in weighing the nature of the student's privacy interest in *Vernonia*, finding that when students choose to engage in such activities, they "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia*, *supra*, 515 U.S. at 657.[25]

Moreover, Respondents and *Amici* mistakenly view participation in Competitive Activities as a "choice" each student makes similar to the choice to participate in graduation, citing *Lee v. Weisman*, 505 U.S. 577, 595 (1992). (Brief, 21). In truth, a student who desires to engage in Competitive Activities may initially make a choice to try out or audition for the athletic, cheerleading, pom pom, band, vocal, FFA, FHA and academic teams; however Oklahoma, like other states, requires that "state and national contests are those for which a student **must earn the right to compete**." (C.A. App. 71) (Emphasis ours).

Tecumseh's Policy does not bar students from engaging in extracurricular activities if they decline to consent to suspicionless drug testing or if they choose to maintain a lifestyle of substance abuse. These students may choose a wide variety of other extracurricular activities offered by Tecumseh, or they may practice and be instructed in the classroom associated with the Competitive Activities. The Policy only limits those students from competing against other students.[26]

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[25] Justice Ginsberg, concurring, noted that only students "seeking to engage with others in team sports" rather than students "required to attend schools" were at issue. *Vernonia, supra,* 515 U.S. at 666.

[26] Some individuals in the City of Tecumseh and surrounding towns now apparently object to Tecumseh's Policy because it is their responsibility to ensure that their children are "safe or well-behaved when

3. The Character of the Intrusion Implicated by Tecumseh's Policy is Negligible.

Respondents portray public restrooms as places where people "do not generally converse or even make eye contact," and where a sense of privacy is created by not speaking to others, expecting that "others will not engage with them." (Brief, 22, 23).

Clearly, the average school restroom cannot be characterized in such a fashion. These restrooms are collectively used by students within a span of five minutes between classes. Lindsay did not use school bathrooms very often, but when she did, other students and teachers were using the facilities at the same time out of necessity. (C.A. App. 194). School bathrooms during the periods between classes neither are quiet nor are they private places. Moreover, Lindsay found the procedure of producing urine in a hospital equally as offensive as producing her urine at school. (C.A. App. 195).

As found in *Vernonia* and both the district court and court of appeals here, the intrusion of privacy by providing urine in a school restroom is negligible.[27]

With regard to the other aspects of privacy, the one coach who erroneously looked at a student's prescription list (Brief,

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they are outside the school's custodial control." (Brief of Jean Burkett *et al.*, 11). The premise of Tecumseh's Policy is to ensure their children's safety when they are within the school's custodial control, but outside of the numerous safety valves contained in the traditional school setting that offers students, as well as their parents, protection.

[27] New technologies will no doubt become available to detect drug use by students. Currently, detection of drug use by analyzing hair samples is a measure that is employed. However, such methodology is in its early stages. (See, *i.e.*, "Drug Tests at Work Can Be Hair Raising," *available at* http://www.sunone.com/news/articles/02-08-00e.shtml). No doubt such sampling would be a "search" and Respondents would likewise find such procedure invasive.

24) is the same coach that for health and safety reasons has required the same information from her students when she travels with them overnight to competitions long before the Policy was ever implemented. (Pet. for Cert., App. D, 75a).[28] The Policy is designed to minimize the privacy intrusiveness of the procedure (J.A. 198) among those student who already have a more diminished privacy interest than the general student population.

4. The Nature and Immediacy of Tecumseh's Concern is Important Enough to Justify the Search at Issue.

Respondents have transformed Tecumseh's prong of the balancing test from a showing of the nature and immediacy of its concern to a demonstration that its concern "comes in response to a real and immediate problem." (Brief, 25).

Respondents have ignored the basic premise in *Vernonia* that Tecumseh is required to show "an interest which appears *important enough* to justify the particular search at hand" in light of the fact that the search is relatively unintrusive and the expectation of privacy of students in Competitive Activities is diminished. *Vernonia*, supra, 515 U.S. at 661.

In *Vernonia*, this Court found the deterrence of drug use among students to be important enough to meet the requirement for the nature of a school's concern. With regard to the specific group of athletes, the nature of the concern was heightened because the risk of physical harm to the drug users, their teammates or the other students on the opposing

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[28] By school policy in many schools throughout the country, students are prohibited from possessing prescription or non-prescription medication while at school. If a student requires medication during the school day, school districts routinely require that all medication must be administered by school officials. Therefore, certain school officials are typically aware of student health and medication information.

team is particularly high. As explained in their brief, Tecumseh's concern likewise goes beyond deterrence.

The Policy is implemented not only as a preventive measure, but to combat an ongoing drug problem in Tecumseh.[29] Tecumseh has never taken the position that students engaged in Competitive Activities are the only students or even the most likely students to abuse drugs.[30] Tecumseh, after proper deliberation and consideration,

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[29] Respondents fault Tecumseh for failing to test for alcohol, tobacco, or ecstacy. (Brief, 45). As shown by the record, ethanol (alcohol) and nicotine are detectable for short periods of time (J.A. 70, 71), and methylenedioxymethamphetamine, more commonly known as "ecstasy" (*See*, "MDMA, ONDCP Drug Policy Information Clearinghouse, Fact Sheet, July 2000," *available at* http://www.whitehouse-drugpolicy.gov/publications/pdf/ncj181141.pdf) contains concentrations of amphetamines which can be detected through the testing process.

[30] On this issue, Respondents and their *Amici* have numerous responses for why Tecumseh's position should fail. As examples, *Amici* American Academy of Pediatrics suggests that "young people who are already well protected from substance abuse are the same ones who are more likely to join in school activities." (Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*, 11); *Amici* National Association of Criminal Defense Lawyers contends that "[i]f students in virtually any extracurricular activity may be drug tested, the school effectively only drug tests the college bound . . ." (Brief *Amicus Curiae* of National Association of Criminal Defense Lawyers, *et al.*, 18) and; *Amici* Professor Akhil Reed Amar surmise that "[W]e are aware of no reason to believe that high school students subject to this policy are more likely to use drugs than college students a few years older." (Brief *Amici Curiae* of Profession Akhil Reed Amar, *et al.*, 10). In sharp contrast, however, the American Civil Liberties Union issued a position paper in September, 1999 which states: [s]tudies of college students consistently show no difference between marijuana users and non-users in grade-point averages, career aspirations, or participation in extra-curricular activities." (C.A. App. 1006-1008). This dispute among collectors of statistical data as to whether students engaged in extracurricular activities are more likely, less likely or equally likely to engage in illicit substance use adds nothing to the real fact that kids engaged in Competitive Activities do drugs.

determined that only those students who participate in Competitive Activities, who are not insulated from drug abuse,[31] who voluntarily subject themselves to higher in-school and out-of-school standards and regulations, and who command from officials a greater degree of concern due to injury and/or limited supervision should be covered by the Policy.[32] This was a reasonable and considered exercise of Tecumseh's judgment. The action of the Tecumseh Board in adoption of the Policy, after inviting public comment and scrutiny, is not arbitrary and capricious, nor is it unfounded.

As to the immediacy of the concern, Respondents and the court of appeals have mistakenly placed this factor as the primary and exclusive factor to determine whether

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[31] Respondents view the testimony of the Tecumseh Board President that she selected the interscholastic activities of athletics, FFA and band because they were her "pet" organizations as proof that Tecumseh's primary concern was not drug-related, but merely symbolic in nature. (Brief, 3). Ms. Rogers is not only a board member, but was active as a parent in the Band Booster Club, FFA Booster Club and Athletic Booster Club (J.A. 90), and much of her knowledge of drug use was obtained through these activities.

[32] To support their argument that Tecumseh's concern due to the limited supervision of students is not legitimate, Respondents note that the Math Club, which has not been in existence for a number of years, once went on a trip to a Colorado ski resort. (Brief, 30). Petitioners admitted the trip was a "club" sponsored trip, not a district-sponsored trip where the coach is paid to supervise the students and the district is liable to the parents for their safety. This is the same type of trip, similar to the student trips to Six Flags, that is not district-sponsored and where students themselves pay for the excursion. (C.A. App. 560, 562). Moreover, *Amici* American Academy of Pediatrics agrees that the risk of harm to students is greater when little or no supervision is provided them. (Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*, 12, 13). As Tecumseh stated in the lower court, whether these students are left to their own devices at home with minimal parental supervision or in school activities with minimal school supervision is a distinction in which the District finds little comfort.

Tecumseh's Policy is constitutional. Moreover, "immediacy" of the concern appears to be defined by Respondents as a concern that has reached a "crisis stage."

Tecumseh's concern is immediate because a drug problem exists in its schools and has existed for a long time despite the numerous measures it has implemented to deter and eliminate the problem. Students who wish to engage in Competitive Activities also engage in substance abuse. The immediacy of the concern to Tecumseh is heightened because the students engaged in Competitive Activities who engage in substance abuse are in the custody and care of school officials during untraditional times when there is minimal supervision and the already implemented measures cannot be utilized. Immediacy should not be defined to require Tecumseh to wait until drug abuse gains a strangle hold on these students before it may take steps to eliminate the abuse through suspicionless drug testing. As so eloquently stated by Judge Ebel:

> "To the extent that it is possible to prevent the irreparable harm attendant to illegal drug use through the diligent efforts of officials in our public schools, we should allow them to try."

(Pet. for Cert., App. A, p. 39a).

Respondents point to and detail the applications submitted by Tecumseh to apply for federal funds under the Safe and Drug Free Schools and Communities Program as documented proof that Tecumseh does not have a drug problem. (Brief 1, 35, 36, 37, 39). Those applications show that alcohol has been the major problem at Tecumseh since the 1988-89 school year (the applications for funding are submitted in the previous year for funding in the ensuing year). (J.A. 163,168). Alcohol remained the number one substance abuse problem until the 1995-96 school year when tobacco was identified as an additional major problem. (J.A. 186). With regard to the use of controlled dangerous substances, there were indications by the previous school administration that they believed drug

use was "going down" in the 1989-90 and 1991-92 school years (J.A. 168, 171); however, there is no indication that drug use continued to decrease after the 1991-92 school year. The applications all consistently demonstrate that drug use is present in Tecumseh, although not as rampant as alcohol or tobacco.

The nature and immediacy of Tecumseh's concern could well have included suspicionless drug testing for alcohol and tobacco; however, due to the limited time span after use for effective detection (J.A. 71) it would probably prove to be a futile endeavor.

5. *Vernonia* Remains as the Controlling Authority to Determine the Constitutionality of Tecumseh's Policy.

The overall theme emerging from the Brief of Respondents and many of their *Amici* is that the *Vernonia* decision is merely an aberration which should be limited to its specific facts. They argue that, if Tecumseh's Policy were limited to student athletes who were known to be the ringleaders of a rebellious drug culture, the *Vernonia* decision would apply.[33] Since Tecumseh's Policy covers students engaged in all interscholastic competitions and who have not been identified as rebellious drug kingpins by Tecumseh, Respondents and *Amici* argue *Vernonia* does not apply.

If the *Vernonia* decision was intended only to be used when student athletes become the leaders of the drug culture, the ruling contained in the decision surely would have stated just that—drug-ravished athletes can be randomly drug tested. Rather, this Court employed the test it had earlier adopted to

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[33] Brief, 6; Brief of Juvenile Law Center, *et al.*, 8; Brief of Jean Burkett, *et al.*, 1; Brief *Amici Curiae* of The Rutherford Institute, 19; Brief *Amicus Curiae* of National Association of Criminal Defense Lawyers, *et al.*, 3.

determine the constitutionality of suspicionless drug testing by state actors. If the environment in question presents a special need, suspicionless drug testing will be constitutional if the governmental concern and need outweigh the privacy interests of the individuals involved.[34]

Finding the school environment to be an already established special needs environment,[35] the balancing of individual privacy and government interests was necessarily employed in *Vernonia*. Tecumseh believes the utilization of this Court's enunciated balancing test demonstrates that Tecumseh's determination to implement a suspicionless drug testing program is a constitutional exercise of its judgment as guardians and custodians of its students.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[34] "Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional." *Vernonia*, 515 U.S. at 665, 666.

[35] Interestingly, *Amici* Professors Akil Amar and Vikram Amar appear to be expressing the contrary and flawed argument that because the majority of these students are non-voting minors and are "structurally disabled" from protecting their interest, the ability of a school board to prescribe their conduct should be more curtailed than the government's ability to prescribe the conduct of adult citizens. (Brief *Amici Curiae* of Professor Akhil Reed Amar, *et al.*, 9).

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